



MEMORANDUM

October 6, 2004

TO: CRWCD BOARD OF DIRECTORS

FROM: CHRIS TREESE

RE: RECREATIONAL IN-CHANNEL DIVERSIONS

Recreational In-Channel Diversions (RICD) were legislatively authorized in 2001 with the passage of SB 216. Since passage of this bill, less than a hand full of RICD applications have been filed with the courts and the CWCB (Pueblo, Longmont, Upper Gunnison, and Steamboat Springs). While the controversy over RICDs may be outsized relative to the number of cases filed, RICDs will clearly continue to be the subject of controversy and litigation.

RICDs will almost certainly be the subject of one or more legislative proposals in 2005. Several River District board members have expressed reservations with RICDs generally and SB 216 specifically. I would appreciate additional Board discussion at the October meeting regarding River District position or direction regarding this topic.

Historical Positions:

In 2001, when the Legislature had SB 216 under consideration, the River District initially opposed the bill as introduced. Our principal concern was the powers being conferred on the CWCB regarding its review and approval authorities regarding an RICD application. The River District acknowledged in testimony and written materials that RICDs are unique and subject to mischief. However, we opposed granting the CWCB quasi-judicial authorities regarding RICDs, preferring that any appropriate special consideration be legislatively enumerated and ultimately vested with the water court. For the most part, we prevailed in this position. As amended, SB 216 itemized several requirements and special considerations for RICD applications. The Legislature granted the CWCB special review authority regarding certain aspects of an RICD application, but accorded its findings only presumptive weight. Additionally, the River District prevailed in its assertion that any claim of injury by the CWCB and others is the subject of a de novo review before the water court.

The River District supported the other elements of SB 216 that were not the focus of as much controversy. These less controversial elements included the limitation of RICD ownership to cities, counties and water-related governmental districts, an explicit declaration that the stream must be “diverted, captured, controlled, and placed to beneficial use . . . for recreation,” a prohibition against the conversion of conditional, consumptive use rights to RICD rights, and a declaration that RICDs are not eligible for the constitutionally-provided “municipal preference” even when held by a municipality.

Since the passage of SB 216, the Board directed staff to file an amicus brief in the City of Golden’s RICD case that was largely in support of the applicant’s position. (The Golden case was not heard under SB 216, as 216 was introduced after Golden filed its application.) More recently, the Board directed General Counsel to participate at the trial and in the subsequent appeal in support of the Upper Gunnison River Water Conservancy District’s RICD application. The Board received a copy of the appellate brief attached to a confidential memorandum from Peter on September 29. Peter’s confidential cover memo, which includes a concise summary of the compromise struck in SB 216, is attached.

Current Controversy:

Attached are letters from Director Sharp and Steve Harris to the Interim Legislative Water Resources Review Committee critical of SB 216 and recommending legislative changes. Steve Harris is a consulting engineer who does considerable work for the Southwestern Water Conservation District and smaller water districts in the southwest corner of the state. Both Director Sharp’s and Steve Harris’ concerns focus on the potential for an RICD to control or veto any future changes in water rights that would alter the flows in the RICD stream reach. Both gentlemen express concerns with the definition of the physical control structures required by SB 216.

Both men also address the admittedly difficult issue of the “duty of water” for an RICD water right. Is one person enjoying a water park “beneficial use”? Director Sharp offers several specific amendments to restrict the purposes and amounts for which an RICD can be granted. Steve Harris has several recommendations in common with Director Sharp’s. Mr. Harris also addresses related concerns with the CWCB’s instream flow (ISF) rights and recommends that ISFs and RICDs either be prohibited within a specified proximity to the state line (30 miles is mentioned) or required to have the concurrence of all the water districts in which the ISF or RICD is located prior to filing an application.

Also attached for the Board’s convenience is a copy of SB 01-216.